

Hon. Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

MARTYN STEWART, d/b/a,  
NATURESOUND.ORG,

Plaintiff,

v.

APPLE INC., MITCH WAITE GROUP  
LLC, AND MITCHELL WAITE,

Defendants.

No. 2:10-cv-01012-RSL

REPLY IN SUPPORT OF APPLE INC.'S  
MOTION TO DISMISS FOR FAILURE  
TO STATE A CLAIM

Noted on Motion Calendar:  
October 1, 2010

Plaintiff Stewart's opposition does nothing to cure the fundamental disconnect between his registration, his allegations regarding ownership, and his allegations regarding infringement. As demonstrated in Apple's motion, that shortcoming in his pleading mandates dismissal of the complaint. Stewart's opposition actually worsens the inconsistencies in his pleading and further demonstrates the merit of Apple's motion.

Stewart's argument that copyright in his individual bird sound recordings "exists independently of registration" (Opp'n at 2) misses the point: of course copyright exists independently of registration, but copyright *litigation* cannot proceed without registration. *See Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237 (2010); *see also* 17 U.S.C. § 411. And Stewart cannot and does not claim that he registered his individual bird sound recordings.

1 The complaint states that his “recordings were made and collected over a period of 35  
 2 years.” (Compl. ¶ 11.) Thus, Stewart’s registration—“Birds of America Vol. 1,” which  
 3 issued as SRu000945444 in 2010<sup>1</sup>—is necessarily for “a work formed by the collection and  
 4 assembling of preexisting materials or of data” that constitutes a compilation under 17  
 5 U.S.C. § 101. Such a registration cannot serve to register the underlying individual  
 6 recordings. *See, e.g., Bean v. Houghton Mifflin Harcourt Pub. Co.*, 2010 WL 3168624, at  
 7 \*4 (D. Ariz. Aug. 10, 2010) (compilation registrations did not register underlying  
 8 photographs). Stewart is, therefore, entitled to protection only for the selection,  
 9 coordination, or arrangement of “Birds of America Vol. 1.”

10 But Stewart has not alleged infringement of the selection, coordination, or  
 11 arrangement of “Birds of America Vol. 1.” (*See, e.g.,* Compl. ¶ 16.) To the contrary, he  
 12 now claims that he has “not alleged that he owns the copyrights to each and every bird  
 13 sound in the [iBird] application.” (Opp’n at 3.) By claiming that only a portion of the bird  
 14 sound recordings in the iBird applications are his, Stewart has conceded that the iBird  
 15 applications do not copy the selection, coordination, or arrangement of the recordings in  
 16 “Birds of America Vol. 1.”

17 Nor should Stewart be permitted to mitigate the impact of the Budney Declaration  
 18 by contradicting his complaint. The notion that Stewart has asserted infringement by only  
 19 some recordings in iBird contradicts the clear import of his allegation that “*the* bird sound  
 20 recordings used in the iBird applications *are* in fact *Mr. Stewart’s bird sound recordings.*”  
 21 (Compl. ¶ 17 (emphasis added).) Similarly, it contradicts Exhibit B to the complaint—a  
 22 purported screenshot from the iBird application that lists Stewart as the sole “recordist.”  
 23 (Compl., Ex. B.)

24 Stewart’s opposition also flatly contradicts the complaint’s allegation that Defendant  
 25 Waite sought to license Stewart’s bird sound recordings for a different application  
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<sup>1</sup> *See* Exhibit 1 (U.S. Copyright Registration No. SRu000945444).

1 (“Winged Explorer”) and then used those recordings in the iBird applications without  
 2 Stewart’s knowledge. (Compl. ¶¶ 13–14.) Stewart now claims that “Waite requested and  
 3 received copies of those recordings from Mr. Stewart specifically for the purpose of  
 4 incorporating them into the iBird application.” (Opp’n at 2:19–20.) These factual  
 5 allegations cannot both be correct.

6 Stewart’s claims are a rough jumble of inconsistencies that do not support a  
 7 copyright infringement claim and leave substantial questions regarding his ownership of the  
 8 copyrights he attempts to assert. If Stewart is truly the owner of the copyrights in all of the  
 9 recordings underlying his supposed compilation, he should have no trouble registering  
 10 those copyrights and amending his complaint. But he must do so before the case may  
 11 proceed. At the very least, Stewart’s claims for statutory damages and attorney’s fees—  
 12 which he nowhere defends in his opposition—must be dismissed, and expedited discovery  
 13 limited to the validity of Stewart’s registration should be permitted.

14 DATED: October 1, 2010.

15 Respectfully submitted,

16 By: /s/ David R. Eberhart

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26 Attorneys for Defendant Apple Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing

to:

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Mann Law Group

Attorneys for Plaintiff

**John E. Whitaker**  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 1st day of October, 2010 at Seattle, Washington.

/s/ Shelley Meyer

Shelley Meyer  
Legal Assistant